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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
Implementation of the Telecommunications Act of 1996	)	CC Docket No. 96-238
Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers	)	

REPLY COMMENTS OF ICG TELECOM GROUP

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SUMMARY

The Commission's desire to streamline and expedite the complaint process through stringent and exacting standards is commendable. But the desire to improve the complaint process can cross the line into onerous and inflexible requirements that make the process into an art form or game of skill that sacrifices fairness and promotion of the broad public interest and remedial purposes that are the object of the Commission's processes. ICG urges the Commission to temper certain of its proposals so that fairness is not lost in the laudable attempt to expedite resolution of complaints.

Extensive and extended pre-filing requirements can deny rather than advance prompt resolution, as can undue pressure to "compromise" or "settle away" statutory rights. To address these concerns, the Commission should require only a five day notice period after notification and demand on the defendant before a complaint can be filed. Further, failure to reach a settlement should be not a basis for challenging whether the complaint is validly filed. Any certification requirements should be reciprocal. And the pre-filing period should be used for the exchange of information requests.

Most parties support ICG's view that allegations based on information and belief should be allowed. ICG does not oppose a requirement that the complainant include a statement explaining why the information is not available and the basis for the information and belief allegation. But proposals to limit allegations based on information and belief to situations where the information "in in the sole possession of the defendant" are too

drastic. Particularly in cases of discrimination, as ICG has explained, the information may also be in the possession of third parties who are unwilling to share it.

Many parties support ICG's view that there must be some discovery as of right. There simply will not be adequate information in many instances without discovery. ICG has suggested and reiterates herein steps the Commission can take to accelerate discovery and eliminate abuses. Rather than eliminate discovery, the Commission should accelerate and resolve disputes early at the status conference.

In this regard, the Commission staff should hold more frequent status conferences. The Commission rules should allow for a status conference on request of the parties or on the Commission's own motion.

ICG continues to believe that injunction standards are too stringent for interim relief in Commission proceedings. In most instances, the complainant will be seeking access to a service offered by the defendant. The Commission can grant interim relief subject to "true up" without imposing a great burden on the defendant.

Bifurcated damages proceedings are desirable, as is referral to an ALJ for a damages determination, so long as there is a commitment to expedite the damages phase as well. Otherwise, the parties' incentive to bifurcate will be substantially blunted.

Briefs should be permitted.

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ICG Telecom Group, a subsidiary of ICG Communications, Inc. hereby replies to the comments submitted in response to the Commission's Notice of Proposed Rulemaking (the "NPRM") issued on November 27, 1996, in the above referenced proceeding. ICG is the third largest "facilities-based" competitive local exchange carrier ("CLEC").[1]

As noted in ICG's initial comments, CLECs, and other competitive or new service providers relying on Section 251 to gain access to incumbent local exchange carrier ("ILEC") (and in particular Bell Operating Company ("BOC") networks) have a unique interest in the Commission's complaint process. The Telecommunications Act of 1996 has accorded these entrants new rights by requiring ILECs to provide new kinds of access and

[1] The Association for Local Telecommunications Services ("ALTS") joins in these comments.

interconnection to their networks. It is only the compulsion of the Telecommunications Act, and in the case of the BOCs also the prospect of entry into providing in-region interLATA services pursuant to Section 271, that has moved the ILECs to accord the access and interconnection to their networks that they have historically denied to competitors and new service providers. Competitors and new services providers such as ICG are already very dependent, and once the RBOCs have achieved clearance to enter the in-region interLATA services market will be even more dependent, on the Commission's complaint process to assert their rights under the Telecommunications Act. Accordingly, ICG has a vital interest in the outcome of this proceeding.

I. WHILE ICG SUPPORTS THE COMMISSION'S ATTEMPT TO STREAMLINE PROCEDURES FOR PROCESSING FORMAL COMPLAINTS IT IS CONCERNED THAT THE PROPOSED RULES MAY LEAD TO ADDITIONAL LITIGATION OVER PROCEDURAL ISSUES

The Commission's efforts to streamline its complaint process and thereby expedite resolution of substantive disputes before the Commission are laudable. There is a tension, however, between, on the one hand, the Commission's desire to expedite litigation through the rigid and somewhat onerous proposed procedural rules and prefiling activities and, on the other hand, the fairness and flexibility which would result from a less stringent set of rules of procedure. ICG respectfully submits that the new Commission rules should not be framed in such a way so as to reduce pleading to an art form or game of skill that can only be played by the most sophisticated and experienced of parties and practitioners.

In this respect, a brief review of the historical context in which the modern Federal Rules of Civil Procedure were promulgated may be instructive:

> At common law there was a generally held belief in the efficacy of pleadings. The whole grand scheme was premised on the assumption that by proceeding through a maze of rigid, and often numerous, stages of denial, avoidance, or demurrer, eventually the dispute would be reduced to a single issue of law or fact that would dispose of the case. The system was wonderfully scientific. It also proved to be wonderfully slow, expensive, and unworkable. The system was better calculated to vindicate scientific rules of pleading than it was to dispense justice. The great Baron Parke is said to have boasted to Sir William Erle that he had aided in building up sixteen volumes of Meeson & Welsby, reports devoted to decisions on procedural points. "It's a lucky thing," Sir William replied, "that there was not a seventeenth volume, because if there had been, the common law itself would have disappeared together amidst the jeers and hisses of mankind." Wright & Miller, Federal Practice and Procedure; Civil 2d § 1202 at 70, quoting Coleridge, The Law in 1847 and The Law in 1889, 1890, 57 Contemp. Rev. 797, 799.

As the United States Supreme Court noted, "the Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." Conley v. Gibson, 355 U.S. 41, 48, 78 S. Ct. 99, 103 (1957). While ICG does not advocate simple "notice pleading" as required by Rule 8 of the Federal Rules of Civil Procedure, it does urge the Commission not to return to the days when form ruled over substance and the Courts were awash in procedural motions which delayed or, indeed, often prevented ultimate resolution of disputes on the merits.[2]

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[2] ICG's concern in this regard is particularly heightened when it reads proposals from some of the large carriers such as Bell Atlantic, NYNEX, Bell South and others that would further burden complainants at the prefiling stage and require additional format changes intended to turn the complaint process to be into an arduous gauntlet which cannot be reasonably traversed by most complainants.

Instead, ICG urges the Commission to temper certain of its proposals so that fairness and flexibility are not lost in its laudable attempts to expedite resolution of disputes. As noted in ICG's initial comments, the process of initiating and prosecuting complaints cannot be so difficult that it discourages —rather than facilitates— the presentation of claims to the Commission.

II. REPLY COMMENTS ON SPECIFIC PROPOSALS

ICG offers the following reply comments on the specific proposals in the NPRM.

A. Prefiling Procedures And Activities: NPRM ¶ 27-29

In its initial comments, ICG noted that while it supported the Commission's proposal requiring the parties to attempt to settle their disputes prior to the filing of a complaint, ICG urged the Commission to clarify the rules to assure that the requirement did not lead to exhaustive negotiations and thereby extensive prefiling delays contrary to the spirit and purpose of the Telecommunications Act of 1996 (the "1996 Act"). Additionally, ICG expressed concerns that the request that the parties attempt to reach a settlement not be read to require that the parties be forced to abandon their rights.

ICG believes that its first concern would be addressed by modifying the proposed rules to set a finite time period for the pre-filing negotiations along the lines of the proposal suggested by Sprint in its comments (5 day waiting period for filing complaint after notice to defendant and offer to discuss settlement).

ICG's second area of concern also is addressed in the sentiments expressed by Sprint that the rules should make clear that the inability of the complainant and/or defendant to reach a settlement may not be used to challenge the "good faith" of either party. ICG echoes Sprint's comments in this regard and urges the Commission to clarify its proposal regarding prefiling settlement discussions to make explicit that the failure to reach settlement will not be permitted to become an issue in the ensuing Complaint proceeding.

ICG also supports the recommendations of the Telecommunications Resellers Association (the "TRA") , GST Telecom, Inc. ("GST") and others that if there is a certification requirement it must be reciprocal and that a defendant be required to certify in its Answer that it participated in good faith settlement discussions with the Complainant. Failure to do so should result in the striking of the Answer.[3]

Finally, ICG also sees merit in the proposal set forth by MCI Telecommunications Corporation ("MCI"), that the prefiling period be used to accomplish at least some discovery so that the parties and the Commission can "hit the ground running" once the Complaint is served. ICG agrees with MCI that the deadlines for responding to prefiling information requests should be short and does not oppose the two weeks proposed by MCI.[4] ICG further endorses MCI's proposal that the

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[3] Consistent with its belief that pleading should not be reduced to an art form, ICG suggests that if either a Complaint or Answer are dismissed or stricken for failure to address the prefiling certification, the appropriate party be permitted to amend without leave within 5 calendar days of such Commission action. Accordingly, ICG opposes any suggestion that the dismissal or striking of the Complaint or Answer be with prejudice to the party's right to refile an amended version of the offending pleading.

[4] Conversely, ICG opposes Comptel's proposal to add a formal layer of prefiling arbitration into the process because it will only serve to add to delay in the resolution of the dispute.

Commission's procedures be structured to induce parties to provide information without delay. ICG urges the Commission to adopt MCI's suggestion that a defendant's failure to respond to prefiling information requests result in the reduction in the pleading requirements imposed on complainants, under either the Commission's current proposal or whatever standards the Commission may ultimately adopt.[5]

B. Format And Content Requirements: NPRM ¶¶ 36-46

In its initial comments on this section of the NPRM, ICG made two central points. First, the requirements for full and complete explanations of their positions imposed on complainants must be reciprocal and imposed on defendants as well. Accordingly, ICG included proposed amendments to the language of Section 1.724 to require defendants to include in their answers specific alternative facts and full and complete explanations of the basis for any specific denials contained in their answers and/or affirmative defenses.

Second, ICG opposed the Commission's proposal to ban allegations based on information and belief, explaining that in many cases —including discrimination cases and cases involving cost allocations between regulated and unregulated activities— necessary information would be in the possession of defendants or third parties. Accordingly, ICG

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[5] In contrast to these helpful suggestions, the Commission should be wary of comments such as those from Bell Atlantic, NYNEX, Bell South and USTA that tend to require even more prefiling activity than currently proposed. For example, Bell Atlantic would essentially require the complainant to submit a pre-complaint to the defendant to which the defendant would respond in kind. Similarly, NYNEX and Bell South would have the Commission add formal mediation or ADR phases prior to filing the complaint. All of these proposals will do nothing more than add to a complainant's burden and further delay resolution of the dispute.

argued for flexibility in asserting claims on information and belief and some opportunity for discovery as a matter of right to gather critical factual information that generally would not be available to complainants prior to filing their Complaints.

ICG's recommendation that the Commission not ban allegations based on information and belief was echoed by many of the parties commenting on the NPRM—including TRA, MCI, GTE Service Corporation, Bechtel & Cole, Chartered ("B&C"), GST, Inc., MFS Communications Company, Inc., ("MFS"), KMC Telecom, Inc. ("KMC"), Teleport Communications Group, Inc. ("TCG"), Competitive Telecommunications Association ("Comptel"), U S West, Inc. ("US West"), America's Carriers Telecommunication Association ("ACTA") and Association of Telemessaging Services International ("ATSI")— by and large for the same reason, i.e. that at the outset of the proceeding the complainant is not likely to have the information necessary to fully assert its claims other than upon information and belief because that information is in the possession of the defendant or some other third party.

While ICG does not oppose a requirement that a complainant include some statement as to why it must present allegations based on information and belief (see e.g. comments from MCI and GTE), it strongly opposes the suggestion by NYNEX in particular that such allegations be prohibited unless the complaint can demonstrate, inter alia, that the information is "in the sole possession of the defendant." NYNEX's proposal is contrary to flexible pleading requirements and imposes severe and unfair burdens on complainants. Moreover, NYNEX's proposal ignores the reality that, at least in

discrimination cases, the information may also be in possession of third parties who would be almost as disinclined as defendants to share it with complainants.[6]

Consistent with ICG's central theme that Commission proceedings should not become a test of technical pleading abilities, ICG strongly opposes the comments of Bell Atlantic and others that failure to comply with the Format and Content requirements should result in summary dismissal with prejudice. To the contrary, corrective amendments should be available without leave, at least at the initial stages of the proceedings.

C. Discovery: NPRM ¶¶ 48-56

ICG strongly believes that the parties need discovery as of right to uncover crucial facts relevant to dispute resolution. Indeed, the overwhelming majority of the parties commenting on the subject join ICG in opposing the Commission's proposal to eliminate discovery as of right. As ICG stated in its initial comments, the Commission should not eliminate discovery; rather it should attempt to accelerate discovery and resolve any disputes early in the process either at the initial status conference or at any time thereafter through the initiation of additional status conferences.[7]

As more than one party commented, the parties should be free to direct their cases as they see fit. (See e.g. comments from TRA, TCG and ACTA.) Thus, the parties

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[6] As ICG pointed out in its initial comments, CLEC complainants are likely to be reluctant to involve customers in the process at the risk of permanently losing good will. Moreover, as beneficiaries of ILEC discrimination, such customers are unlikely to cooperate or divulge information in any event. This is not a risk that a complainant should have to bear, when the necessary information also resides with the defendant.

[7] As is discussed in detail below, ICG submits that frequent status conferences -- where staff can monitor the proceedings -- will be an effective tool in expediting discovery and curbing current abuses.

should at least in the first instance be permitted to fashion their discovery requests as they deem appropriate. The staff can address any abuses during conferences with the parties.

ICG agrees with the sentiments expressed by TRA that eliminating or significantly reducing discovery would "tilt an already skewed 'playing field' further in favor of large network service providers . . .". TRA Comments at 16. ICG also refers the Commission to the Comments of NextLink in this regard. As NextLink points out, incumbent carriers often do not provide information about their negotiating positions beyond asserting that they cannot fulfill a particular request. NextLink illustrates the point by referring to instances where interconnection is denied on the grounds that it is not technically possible but without any explanation of the reasons for the alleged impossibility. NextLink Comments at 5-6. Without discovery as of right, complainants will not have access to the information needed to fully support their complaints.

ICG is mindful, however, that discovery abuses do exist —particularly with respect to delay. Accordingly, ICG suggests that complainant be required to submit its discovery requests with the Complaint (with an opportunity to supplement based on assertions in defendant's Answer). Defendant would then be required to serve its objections to complainant's discovery requests —along with defendant's own discovery requests— with the Answer. The complainant would then serve its objections to defendant's requests within 5 days so that all requests and objections could be addressed at the initial status conference.

ICG also respectfully submits that certain of the discovery abuses experienced currently could be significantly reduced if the Commission made it clear that form objections and answers by lawyers —as compared to substantive responses from the parties themselves— would not be looked upon favorably in the process of resolving discovery disputes.

D. Status Conferences: NPRM ¶¶ 57-59

ICG's discussion of discovery leads logically to its comments on the Commission's status conference proposals. As stated in ICG's initial comments, the Commission's proposal with respect to the timing of the initial status conference is crucial to meeting the mandatory resolution deadlines. Where the Commission's proposal falls short, however, is that it does not make provision for additional status conferences which would resolve any subsequent disputes and keep the process moving forward. Subsequent status conferences would also enable the staff to assist the parties to fully develop the record. ICG proposes that, to meet these goals, the proposed rules be modified to expressly provide that the staff will be available for additional status conferences on an expedited basis at the request of any party or on its own motion.

E. Cease, Cease And Desist Orders And Other Forms Of Interim Relief : NPRM ¶¶ 60-62

In its initial comments, ICG opposed the tests proposed by the Commission for issuing Cease, Cease and Desist, or other forms of Interim Relief. Specifically, ICG proposed that rather than having to demonstrate a "likelihood of success" to obtain interim

relief, a complainant should show that it was presenting a "substantial challenge" to the carrier defendant's practices.[8]

Similarly, ICG proposed replacing the "irreparable injury" standard proposed by the Commission with the requirement that the complainant show that there is a "substantial likelihood of competitive harm" if the interim relief sought is not granted.

It is inappropriate to condition interim Commission relief on an evidentiary showing equivalent to that required in an injunction proceeding in federal court because, except in very rare cases, the impact of such interim relief on a defendant in a Commission proceeding is not as severe or dramatic as an injunction in a judicial proceeding. Notably, the Commission's cease and desist orders can be made subject to "true up" in the same manner as an accounting order is designed to keep parties whole. See 47 U.S.C. § 204. Thus, the cost impact of any such order can be addressed at the conclusion of the proceeding. For example, in a discrimination case, where the complainant seeks interim relief requiring a carrier to provide service equal in quality to that provided to others at the same price as charged those others during the pendency of the action, if the Commission later were to find that the defendant had not provided discriminatory service, the Complainant would be required to pay the defendant carrier for the superior service provided during the pendency of the Commission proceeding under the interim order. See Interconnection Order, CC Dkt. No. 96-98, FCC 96-325, at ¶¶ 224-25 (Rel. Aug. 8, 1996) (subsequent history omitted). Cf. 47 CFR § 51.305.

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[8] As ICG noted in its initial comments, a "substantial challenge" is the same standard required for expedited review of Commission Orders to the United States Court of Appeals. See D.C. Circuit Handbook of Practice and Internal Procedures, § VIII.B.

F. Damages: NPRM ¶¶ 63-69

As noted in its initial Comments, ICG supports voluntary bifurcation of the damage issue from proceedings on liability at the complainant's option, but only if there is some procedural assurance that the supplemental complaint proceeding on damages will be resolved within a specified time period (i.e. 90 days) and that damages discovery will proceed on an expedited basis.

ICG does not oppose the requirement that a complainant include a computation of damages with its complaint but, like TRA, cautions against imposition of an overly rigid requirement since —at the time the Complaint is filed— complainants may not have all the facts necessary to completely calculate their damages. Accordingly, ICG joins in TRA's proposal that the requirement be limited to a "good faith" calculation based on information then available to complainant, with an opportunity to amend the Complaint to reflect updated damage calculations after discovery.

ICG does not oppose NPRM ¶ 68 proposing referral of factual issues on damages to an Administrative Law Judge ("ALJ"), as long as the proceedings are resolved within the 90 days ICG proposes or some other relatively short time period. ICG is concerned that referral of the damages proceeding to an ALJ without some limitations on the time for resolution would result in unreasonable delays in contravention of the statutory mandate.

G. Other Required Submissions: NPRM ¶¶ 80-83

ICG joins the overwhelming majority of those commenting in opposing the Commission's proposal to eliminate briefing where discovery is not conducted (NPRM ¶ 81).[9] In ICG's experience, briefs and the briefing schedule are not a major impediment to expeditious resolution of disputes. Indeed, if done correctly, briefs should facilitate resolution because they provide the vehicle for the parties to present their cases —with record citations— in a streamlined and focused manner.[10]

ICG also seeks a modification of the Commission's proposal regarding the submission of a joint statement of stipulated facts and key legal issues five days after the answer is filed (NPRM ¶ 80) because such a short deadline is not realistically workable.[11] Instead, ICG proposes that each party prepare their respective proposed list of stipulated facts and key legal issues and be prepared to discuss them with staff at the initial status conference.

III. CONCLUSION

ICG thanks the Commission for an opportunity to comment of the NPRM and respectfully requests that the Commission consider the comments and the proposed text and rule changes discussed above, and adopt rules in accordance therewith.

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[9] Like most of those commenting, ICG also opposes the elimination of discovery as of right.

[10] From the complainant's standpoint, this opportunity does not exist when the complaint is filed because the complainant has not seen the defendant's factual positions and legal arguments and, therefore, has no opportunity to rebut them.

[11] As noted in ICG's initial comments, the Stipulation from the United States District Court for the Eastern District of Virginia referred to in NPRM ¶ 80 is required much later in the litigation process than proposed here -- after the parties have taken discovery and are preparing for trial.

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Respectfully submitted,

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